

STATE OF MICHIGAN
COURT OF APPEALS

ILENE TINMAN and MICHAEL TINMAN, as
next friends of TZVIH TINMAN,

UNPUBLISHED
February 14, 2008

Plaintiffs-Appellants,

v

BLUE CROSS & BLUE SHIELD OF
MICHIGAN,

No. 268448
Wayne Circuit Court
LC No. 99-932051-CK

Defendant-Appellee.

Before: White, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

Plaintiff Tzvih Tinman, through his next friends Ilene Tinman and Michael Tinman, appeals as of right from the circuit court's order granting summary disposition in plaintiff's favor. On appeal, plaintiff challenges the circuit court's earlier order denying his motion to certify a class for purposes of declaratory and equitable relief. We affirm.

This case was previously before this Court in *Tinman v Blue Cross & Blue Shield of Michigan*, 264 Mich App 546, 553-555; 692 NW2d 58 (2004), which involved an appeal from the circuit court's order denying defendant's motion to decertify the class. This Court held that the circuit court erred by denying defendant's motion because "the individual questions essential to determining defendant's liability predominate over the common questions presented." *Id.* at 566. The instant appeal involves the circuit court's denial on remand of plaintiff's motion to certify a class for purposes of declaratory or equitable relief.

I

We initially address two preliminary matters--defendant's argument that plaintiff no longer has standing to seek class certification because he obtained a judgment on the merits of his individual claim, and plaintiff's argument that the circuit court failed to exercise discretion and blindly adhered to this Court's ruling in *Tinman*, although the context differed. We reject both arguments.

MCR 3.501(D)(3) provides:

A motion for judgment (including partial judgment) under MCR 2.116 may be filed and decided before the decision on the question of class certification. *A judgment entered before certification in favor of a named party does not preclude that party from representing the class in the action if that is otherwise appropriate.* [Emphasis added.]

Therefore, the court rules specifically contemplate a situation, such as the instant case, in which a named party is granted summary disposition in his favor on an individual claim before the class is certified. Further, our Supreme Court recognized in *Northview Constr Co v St Clair Shores*, 395 Mich 497, 511-513; 236 NW2d 396 (1975), on reh 399 Mich 184 (1976), that a court may not conclude from the mere fact that a named plaintiff accepted judgment that he is no longer an adequate class representative. Therefore, defendant's argument that plaintiff lacks standing to act as a class representative is meritless.

Contrary to plaintiff's argument that the circuit court blindly followed this Court's previous decision and failed to exercise its own discretion in deciding plaintiff's motion for class certification, the record shows that the circuit court considered plaintiff's argument, but rejected it for reasons consistent with *Tinman*. The circuit court's opinion identified plaintiff's arguments and explained why the commonality requirement was not met. Merely because the court's opinion is consistent with *Tinman* does not reflect that it failed to exercise its discretion in considering plaintiff's arguments.

II

We review for clear error the circuit court's denial on remand of plaintiff's motion for class certification. *Tinman, supra* at 555. Clear error exists when, although evidence exists to support a finding, this Court is left with a definite and firm conviction that a mistake was made. *Id.* MCR 3.501(A)(1) sets forth the requirements of a class action and provides that one or more members of a purported class may file suit on behalf of all members only if:

- (a) the class is so numerous that joinder of all members is impracticable;
- (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
- (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
- (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
- (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

A class action requires that *all* of the requirements listed in MCR 3.501(A)(1) be met and may not proceed when only some of these factors are established. *A & M Supply Co v Microsoft Corp*, 252 Mich App 580, 597; 654 NW2d 572 (2002) (emphasis in original). Because plaintiff

is seeking class certification, it is his burden to prove that the action satisfies all of the factors. *Id.* at 597-598.

Plaintiff argues that the circuit court clearly erred by determining that the proposed class did not satisfy the commonality requirement of MCR 3.501(A)(1)(b). The commonality requirement necessitates that common questions of law or fact exist that predominate over individual questions. MCR 3.501(A)(1)(b); *A & M Supply Co, supra* at 599. This factor “is concerned with whether there ‘is a common issue the resolution of which will advance the litigation.’” *Zine v Chrysler Corp*, 236 Mich App 261, 289; 600 NW2d 384 (1999), quoting *Sprague v Gen Motors Corp*, 133 F3d 388, 397 (CA 6, 1998). Further, this factor “requires that ‘the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof.’” *Zine, supra* at 289, quoting *Kerr v West Palm Beach*, 875 F2d 1546, 1557-1558 (CA 11, 1989). Nevertheless, no requirement exists that “‘all questions necessary for ultimate resolution be common to the members of the class.’” *A & M Supply Co, supra* at 599, quoting *Grigg v Michigan Nat’l Bank*, 405 Mich 148, 184; 274 NW2d 752 (1979).

In *Tinman*, this Court addressed the commonality requirement with respect to the certification of plaintiff’s proposed class. This Court stated:

In granting class-action certification the trial court ruled that, while MCL 550.1418 does not authorize a private right of action, plaintiff could nevertheless proceed on the theory that defendant’s denial of coverage on the basis of the final diagnosis (conduct directly regulated by MCL 550.1418) constitutes a violation of MCL 550.1402, and that “the predominant issue [in the case] is whether defendant violates statutory law . . . and its certificates if and when it denies benefits for emergency services based upon a final diagnosis.” Stated differently, the plaintiff asserted, and the trial court found, that whether defendant’s alleged “systematic practice” of rejecting emergency claims based on the final diagnosis violates MCL 550.1402 is a common question of fact and law meeting the requirements of MCR 3.501(A)(1)(b). We disagree.

* * *

Here, the trial court broadly framed a common question that merely encompasses the legal claim in this case. As correctly asserted by defendant, a highly individualized inquiry must take place to determine whether defendant engaged in a reasonable investigation based on the available information before denying a particular claim. In other words, whether a potential class member is “entitled” to coverage for emergency health services depends at least in part on whether the individual’s condition rose to the level described in MCL 550.1418. In the context of plaintiff’s contention that defendant’s alleged violation of MCL 550.1418 also comprises a violation of MCL 550.1402, it must be determined with respect to each claimant whether the claimant was provided emergency health services “for medically necessary services” resulting from “the sudden onset of a medical condition that manifest[ed] itself by signs and symptoms of sufficient severity,” as well as whether any denial of payment was for emergency health services up to or after the point of stabilization. The same inquiries apply

in regard to plaintiff's assertions that defendant's alleged violation of MCL 550.1418 also constitutes a breach of contract.

Rather than being subject to generalized proofs, the evidence of the type of emergency health services and medically necessary services provided, the medical conditions involved and whether they occurred suddenly, the signs and symptoms that manifested those medical conditions, and whether payment was denied for services up to the point of stabilization will all vary from claimant to claimant. Thus, it is evident that to determine defendant's liability, highly individualized inquiries regarding the circumstances relevant to each claim clearly predominate over the more broadly stated common question in this case. [*Tinman*, *supra* at 562-565. Footnote omitted.]

On remand, plaintiff moved for certification of a class for purposes of declaratory or equitable relief. In particular, plaintiff sought "a Class-wide declaratory ruling that [defendant's] practice of administering and denying claims for emergency health care benefits based on Class members' final diagnoses of their medical conditions violated MCL § 550.1418 and breached its contracts with the Class members," and an order requiring defendant to re-administer class members' claims. It appears that plaintiff also sought an equitable accounting.

Contrary to plaintiff's argument that the declaratory or equitable relief sought would not require individual proof of each class member's circumstances, a declaration that defendant's practices violated the class members' statutory rights and breached defendant's contracts with the class members would require the same individualized inquiries that this Court discussed in *Tinman*, *supra* at 562-565. In *Tinman*, *supra* at 565, this Court concluded that "to determine defendant's liability, highly individualized inquiries regarding the circumstances relevant to each claim clearly predominate over the more broadly stated common question in this case." (Emphasis added). Because the purported class at issue in this appeal seeks a declaration regarding defendant's liability, and the basis for that liability is identical to that involved in *Tinman*, the same individualized inquiries discussed in *Tinman* would predominate. Moreover, while plaintiff has revised the description of the class sought to be certified, the questions whether the statute was violated as to any particular class member, and whether re-administration is warranted, continue to depend on the individual determinations identified in *Tinman*. Further, to the extent plaintiff sought an equitable accounting after re-administration of the claims, that too would focus on individual, rather than class-wide, determinations.

Plaintiff also challenges the circuit court's ruling that he failed to satisfy the superiority requirement of MCR 3.501(A)(1). Because all requirements of MCR 3.501(A)(1) must be met to certify a class, *A & M Supply Co*, *supra* at 597, even if plaintiff satisfied the superiority requirement, the trial circuit ruling was nevertheless proper based on plaintiff's failure to meet the commonality requirement.¹

¹ We observe that although the amount of recovery for each claimant may be relatively small compared to the expense of litigation, MCL 550.1402(11) provides for an award of reasonable
(continued...)

Affirmed.

/s/ Helene N. White
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood

(...continued)

attorney fees to successful litigants. Therefore, the prospect of only a relatively small recovery should not dissuade a claimant from pursuing a claim.